APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19424

SUN OIL COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL POWER COMMISSION

(April 25, 1962)

BEFORE TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges.

JONES, Circuit Judge: Sun Oil Company made a contract on June 10, 1958, for delivery of natural gas from lands designated and described in the contract to Transwestern Pipeline Company. The contract gave Sun the right, subject to some requirements not material here, to commit the gas from certain other described lands to the sale covered by the contract by the unilateral action of giving notice to Transwestern. The contract was tendered to the Federal Power Commission as a rate schedule. It contained a favored-nation escalation clause and a price-redetermination clause. A certificate of public convenience and necessity was issued by the Commission covering only the gas produced from the lands included in the initial commitment of the contract. On March 3, 1961, the Commission adopted its Order No. 232 which, on March 31, 1961, was amended

by Order No. 232-A. The orders added to Section 154.93 of the Commission's Rules and Regulations a proviso relating to contract provisions for price changes.[1] The substance of the proviso, as it may affect this case, is to render inoperative and of no effect all types of flexible pricing provisions, with some stated exceptions, contained in contracts subject to the jurisdiction of the Commission which are executed on or after April 3, 1961.[2]

On July 3, 1961, Sun gave Transwestern notice, pursuant to the contract terms, that additional acreage and the gas to be produced therefrom were being committed to the contract. On July 12, 1961, Sun applied to the Commission for an amendment to its certificate for temporary authorization to sell the gas produced from the lands added to the contract. On September 21, 1961, the Commission issued its

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[1] Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price, other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

[2] The Regulation was further amended by Order No. - of the Commission which has no application to the question here presented.

letter order[3] granting to Sun temporary authorization to sell gas from the lands added to the contract by the unilateral notice to Transwestern. The order contained a state-

[3] Temporary authorization is hereby granted to Sun Oil Company to sell natural gas for resale in interstate commerce to Transwestern Pipeline Company from the additional acreage as described in the petition filed July 12, 1961, in Docket No. G-15791, subject to the following conditions:

(1) That the rate therefor shall not exceed 17.0 cents per Mcf at 14.65 psia, such rate to be effective until a different prospective rate is established in the proceeding, Docket No. G-15791.

(2) Written acceptance of this authorization by a responsible official of your company within 20 days of the date hereof.

The related rate filing will be considered accepted for filing to be effective on the date of initial delivery, subject to the provisions of Sections 154.94(c) and 154.101 of the Commission's regulations under the Natural Gas Act, upon compliance with the above conditions.

This filing has been designated as follows:

Description	*Designation*
Letter Agreement 7-3-61	Supplement No. 12 to Sun Oil Company FPC Gas Rate Schedule No. 122

Please advise the Commission of the date of commencement of deliveries under such supplement, making reference in your communication to the supplement as designated above.

Further, in the event that any document comprising the listed rate filing was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This authorization and the acceptance of the above supplement are without prejudice to such final disposition of the petition to amend the order issuing certificate as the record may require. Furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

ment[4] that in the event any document executed on or after April 1, 1961, which therein or by adoption provided for rate changes, except those permitted by Section 154.93 of the Commission's Regulations, such provision will be inoperative and of no effect at law and any rate change under such provisions will be rejected. Sun made an application for a rehearing requesting the removal of this statement. By a letter order dated November 22, 1961, in which the statement is referred to as a proviso, the Commission dismissed the application. Sun has filed in this Court its petition for review of the Commission's order of September 21, 1961, in so far as it seeks to make inapplicable, to sales of gas from the added lands, the clauses of the original contract for favored-nation escalation and price redetermination.

In its petition for review Sun asserts that the Commission, in the adoption of Order No. 232 and Order No. 232-A, exceeded the authority conferred upon it by the Natural Gas Act;[5] that the statement or proviso in the letter order is contrary to and goes beyond the provisions of Order No. 232 and Order No. 232-A, that the Commission's order deprives Sun of property without due process of law and is arbitrary, capricious and unjustly discriminatory. The Commission has moved to dismiss the petition for review for lack of jurisdiction on the ground that the petitioner is not "aggrieved" within the meaning of Section 19(b) of the Natural Gas Act[6] and that it will not be aggrieved unless it attempts to obtain authorization for a rate increase under the flexible price provisions of the original contract

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[4] See note 3 supra.

[5] 15 U.S.C.A. §§ 717 et seq.

[6] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Court of Appeals of the United States . . .

and such increase is rejected by the Commission by reason of the provisions of the amendment to the Regulations.

The letter order which Sun seeks to have reviewed is not of a definitive character dealing with the merits of a proceeding before the Commission. It does not presently affect the rights or duties of Sun. It is merely a step in the administrative process and is interlocutory and not reviewable. *Shank, Trustee*, v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 830, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324; *Lee, Trustee*, v. *Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 835, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. That the language in the letter order of which Sun complains has no coercive effect is shown by the meaning given to it by the Commission. In the Motion to Dismiss of the Commission, it is said:

> "Petitioner's claim of actual controversy appears to be based on the contention that the language it objects to in the certificate represents a Commission decision that Section 154.93 is applicable to this case. In fact, however, the Commission has made no such decision. The language complained of is 'boiler-plate' language which has been regularly used in numerous temporary certificates, not as a decision on the facts but as a means of calling the regulation to the attention of the applicant.
>
> "We are authorized to state that the language used was not intended to broaden, narrow, or apply the regulation, or to determine its applicability or scope, or to constitute a condition of the certificate. It is solely of an informatory nature; as was the abandonment language in the Sunray certificate (270 F. 2d 404 * * *) which called attention to a provision of the Act. Like that language with respect to Sunray, the language here in issue has no present impact on Sun."

To the extent the foregoing is a construction of the language of the certificate, we adopt it. To the extent it states principles of law, we agree with it. We would add that neither the adoption of the amendments to the Regulations,

their mention in the certificate, nor the Commission's construction of them is in any sense decisive as to their validity. That issue is not now before us. We shall defer our consideration of it until it is properly presented.

The Commission's motion is granted and the petition for review is

DISMISSED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

SEAL

New Orleans, Louisiana
June 15, 1962

Address all Communications
to the Secretary

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Docket No. G-15791
Sun Oil Company

Sep 21 1961
AIRMAIL

Sun Oil Company
P. O. Box 2880
Dallas 21, Texas
Attention: Mr. R. L. Sullivan

Gentlemen:

Temporary authorization is hereby granted to Sun Oil Company to sell natural gas for resale in interstate commerce to Transwestern Pipeline Company from the additional acreage as described in the petition filed July 12,

1961, in Docket No. G-15791, subject to the following conditions:

(1) That the rate therefor shall not exceed 17.0 cents per Mcf at 14.65 psia, such rate to be effective until a different prospective rate is established in the proceeding, Docket No. G-15791.

(2) Written acceptance of this authorization by a responsible official of your company within 20 days of the date hereof.

The related rate filing will be considered accepted for filing to be effective on the date of initial delivery, subject to the provisions of Sections 154.94 (c) and 154.101 of the Commission's regulations under the Natural Gas Act, upon compliance with the above conditions.

This filing has been designated as follows:

Description	Designation
Letter Agreement 7-3-61	Supplement No. 12 to Sun Oil Company FPC Gas Rate Schedule No. 122

Please advise the Commission of the date of commencement of deliveries under such supplement, making reference in your communication to the supplement as designated above.

Further, in the event that any document comprising the listed rate filing was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This authorization and the acceptance of the above supplement are without prejudice to such final disposition

of the petition to amend the order issuing certificate as the record may require. Furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

By direction of the Commission.

J. H. Gutride
Secretary.

cc: H. B. Coe
Suite 1304
1700 "K" Street, N. W.
Washington 6, D. C.

Mr. C. E. Webber
1608 Walnut Street
Philadelphia, Pennsylvania

Transwestern Pipeline Company
P. O. Box 1502
Houston 1, Texas

Judgment

Extract from the Minutes of April 25, 1962

No. 19424

Sun Oil Company

versus

Federal Power Commission

This cause came on to be heard on the petition of Sun Oil Company for review of an order of the Federal Power Commission issued on September 21, 1961 in Docket No. G-15791, and on the Motion of the Federal Power Commission filed on February 27, 1962 to dismiss the petition for review, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the Commission's motion is granted and the petition for review is dismissed.

No. 19424

On Petition for Rehearing

Before TUTTLE, Chief Judge, and JONES and LEWIN, Circuit Judges.

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above-entitled and numbered cause be, and it is, hereby DENIED.

APPENDIX B

Excerpts from the Natural Gas Act

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

SEC. 7.

(c)[2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be

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[2] Subsection 7 (c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporay acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)][3]

[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention

(d)[4] Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(d)]

(e)[5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825, (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, which amended Section 7 (e), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F. P. C. 29.

[4, 5] See footnote 2, p. 7.

* * * * *

SEC. 19

(b)[9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or, in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

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[9] The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).